Texas Super Foods, Inc. *and* United Food and Commercial Workers, Local Union No. 455, AFL–CIO. Cases 16–CA–13843 and 23–RM–436

May 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 27, 1989, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

In agreement with the judge, we find that extraordinary remedies are warranted. As the judge found, the Respondent's actions, especially those of its president and owner, Jerry Savage, had completely destroyed the conditions for holding a fair third election in December 1988, and the effect of Respondent's conduct could not be overcome without the imposition of extraordinary remedial measures. Savage personally signed the unlawful letters distributed to the employees, and he drafted the unlawful December speech and personally gave it to at least two groups of employees. The effects of his unlawful conduct extended to every member of the bargaining unit. In an attempt to erase the effects of this conduct, and to provide the proper atmosphere for holding a fourth election, we adopt the judge's remedy requiring President Savage to read to employees the notice attached to the judge's decision as prescribed by the judge, and the remedial measures granting union access to the Respondent's employees.

We also agree with the judge's reimbursing the Union for its expenses associated with the hearing in this case, and also its organizational costs in connection with the third election. As more fully set forth by the judge, following the June 3, 1988 second election, the Union filed an objection with the Board relating to a May 30, 1988 letter the Respondent had sent to the unit employees, which impliedly threatened that the employees would lose their jobs if they voted for the Union. On July 22, 1988, a hearing officer sustained the objection and set aside the second election, and the Respondent excepted. Notwithstanding the hearing officer's findings, while its exceptions were still pending before the Board, on September 9, 1988, the Respondent sent another letter, to the employees, with the May 30 letter attached. On November 14, 1988, the Board adopted the hearing officer's report. As the judge found, by its November 18 and December 10, 1988 letters, and its December speeches, the Respondent blatantly disregarded the Board's November 14 decision, and continued on its course of conduct by threatening employees with the inevitability of strikes and loss of jobs if they voted for the Union.

Given the findings by the hearing officer and the Board that the Respondent's actions prior to the second election were objectionable, we find that Respondent's present defense of the same course of conduct before the third election is patently frivolous, and designed solely as a stalling tactic. For this reason, we adopt the judge's award of expenses to the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Texas Super Foods, Inc., LaMarque and Texas City, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Robert G. Levy, II, Esq., for the General Counsel.
James J. Loeffler, Esq. and, with him on brief, *Roxella T. Cavazos, Esq. (Chamberlain, Hrdlicka, White, Johnson & Williams)*, of Houston, Texas, for the Respondent.
Patrick M. Flynn, Esq. (Watson, Flynn & Bensik; of counsel, Umphrey, Burrow, Reaud, Williams & Bailey), of Houston, Texas, for the Charging Union.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. The principal question here is whether Texas Super Foods engaged in unlawful and objectionable conduct requiring that a third election be set aside and a fourth election directed answering that question yes, I also order certain special remedies requested by the Government and the Union.

I heard this case in Houston, Texas, on April 10–11, 1989, pursuant to the February 10, 1989 complaint issued by the General Counsel of the National Labor Relations Board, through the Regional Director for Region 16 of the Board, and the February 13, 1989 order directing a consolidated hearing in Cases 16–CA–13843 and 23–RM–436. The complaint is based on a charge filed December 27, 1988, by United Food and Commercial Workers, Local Union No. 455, AFL–CIO (Union, Local 455, or Charging Party)

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Devaney, in agreeing with the judge that the Respondent's December 10 letter constituted an unlawful threat that strikers will lose their jobs, notes particularly the context of the letter and of the Respondent's overall campaign which on a broadscale basis threatened employees with job loss if they selected the Union in the election.

against Texas Super Foods, Inc. (Respondent, TSF, or Company).[1]

Case 23–RM–436 involves objections Local 455 filed to the results of a third election conducted by the Board's then Region 23 on November 14, 1988. The Union's objections generally are coextensive with allegations of the complaint.

In the complaint the General Counsel alleges that Respondent TSF violated Section 8(a)(1) of the Act by economic threats to employees contained in letters dated September 9, November 18, and December 10. By its answer Respondent admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel,[2] the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is a Texas corporation with its principal office in LaMarque, Texas, with stores in LaMarque and Texas City, Texas, and that it sells, at retail, groceries, meats, and related products at its two stores. During the past 12 months at its two stores, Respondent admits, it had gross sales exceeding $500,000.

Complaint paragraph 3(b) alleges that during the past 12 months Respondent purchased products, goods, and materials valued in excess of $50,000, and that such items were received at Respondent's LaMarque and Texas City stores directly from points located outside Texas. Respondent denies this allegation in its answer to the complaint. Complaint paragraph 3(b) tracks a paragraph in the commerce stipulation in the stipulated election agreement approved by the Regional Director of NLRB Region 23 on July 6, 1987 in Case 23–RM–436. Respondent's bare denial does not nullify the July 1987 commerce stipulation. Accordingly, I find, as Respondent itself admits, that TSF is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits, and I find, that Local 455 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Introduction

This case arises in the context of a campaign by Local 455 to organize the ''front'' (grocery) employees of TSF's two stores at LaMarque and Texas City, Texas. (LaMarque and Texas City are situated between Houston and Galveston.) Jerry Savage, TSF's president and owner, testified the two stores currently have 120 such employees (2:311).[3] The tally of ballots for the most recent election, held December 16, reflects an approximate number of 123 eligible voters (G.C. Exh. 1s).[4]

Unlike the grocery employees, TSF's meat cutters (the ''back'' of the store; 1:170) have been represented by Local 408 of the United Food and Commercial Workers Union[5] in a contractual relationship with TSF for over 30 years (1:171; 2:204, 281). However, TSF employs far fewer meat cutters than grocery employees with a total of about 10 meat cutters for its two stores (1:171).

As noted, Jerry Savage is TSF's president and owner and has been such for 22 years (2:281). Joseph E. Masson, who has worked for TSF about a year, is the manager of Respondent's LaMarque store (1:123, 161) while Joe Aguilar is the store manager at Texas City (1:159–160; 2:207).

After introducing the formal papers (G.C. Exh. l(a)–(cc)) stipulating as to the three joint exhibits, and making an opening statement, the Government rested its case-in-chief (1:36). Following its opening statement the Union likewise rested (1:40). The parties then stipulated that misrepresentations, in the traditional campaign sense, are not an issue in the case (1:42–45). Respondent TSF then called as witnesses Union Representative E. Roy Davila, Store Manager Masson, TSF President Savage, and rested (2:363). When no rebuttal evidence was presented, the parties closed.

Davila's correct title is not clear. So far as is relevant to this case, however, the Union's campaign literature in evidence reflects the title of organizing director (R. Exh. 10, 11, 12). Davila apparently succeeded a Richard Leitner in that position about December 1987 (1:76).

2. Sequence of events

The initial sequence of events is described in a multipart stipulation of the parties (2:276–280). Thus, the beginning event is the Union's recognitional demand letter delivered to TSF on June 11, 1987. That was followed the next day, June 12, by Respondent's filing the petition for election in Case 23–RM–436 (G.C. Exh. la). As additionally stipulated, 3 days later, on June 15, TSF held the grand opening of its new store in LaMarque with picketing beginning by the Union the same day. The following day, June 16, TSF filed a charge with the Board in Case 23–CP–126 alleging unlawful recognitional picketing. The picketing continued (apparently at both stores) for 3 weeks. On July 27, 1987, the Regional Director of NLRB Region 23 approved a withdrawal of the charge in Case 23–CP–126.[6] In the meantime, on July 6, the parties signed, and the Regional Director approved, an agreement (G.C. Exh. 1c) to hold an election on August 7, 1987, in the following unit:

[1] All dates are for 1988 unless otherwise indicated.

[2] Counsel for the General Counsel attached to the Government's brief a proposed order and proposed notice to employees. The Union supplemented its brief with a proposed order and notice. By motion dated May 4, 1989, the General Counsel has moved to correct the transcript of testimony in certain respects. I grant the unopposed motion, except as to item (30). Errors in transcript have been noted and corrected.

[3] References to the two-volume transcript of testimony are by volume and page. Joseph E. Masson, the manager of Respondent's LaMarque store, gave a number of about 120 (1:169).

[4] Exhibits are designated as G.C. Exh. for those of the General Counsel, R. Exh. for Respondent TSF, and J. Exh. for joint exhibits of all the parties jointly. The Union offered no exhibits.

[5] In August 1979 the International Unions of the Meat Cutters and the Retail Clerks merged to form the United Food and Commercial Workers Union, AFL–CIO. C. Gifford, *Directory of U.S. Labor Organizations* 63, 64 (1988–1989 ed., BNA).

[6] The parties stipulated that no inference is to be drawn from the withdrawal of the charge (2:277).

> All employees of Texas Super Foods, Inc. at its Texas City and LaMarque, Texas grocery stores, *excluding* all meat department employees, office clerical employees, salaried employees, and supervisors as defined in the Act.

Of 119 valid votes counted in the August 7, 1987 election, 72 were against the Union and 47 were yes. There were 7 challenged ballots (G.C. Exh. 1d). Local 455 filed timely objections (G.C. Exh. 1e), and on February 11, 1988, the Acting Regional Director of NLRB Region 23, pursuant to a February 5, 1988 agreement by the parties for a second election and the Union's withdrawal of its objections, set aside the August 7 election and directed a second election (G.C. Exh. 1f).

The second election, conducted June 3, 1988, likewise resulted in a loss by the Union. As reflected by the tally of ballots (G.C. Exh. 1h), of 103 eligible voters 49 voted ''No'' and 41, ''Yes.'' Challenged ballots were five in number. The Union filed objections (G.C. Exh. 1i),[7] and by order dated June 19, 1988, the Regional Director for NLRB Region 16[8] set a hearing for July 7 on the Union's objections (G.C. Exh. 1j). Following the July 7 hearing before him, Hearing Officer Wayne A. Rustin issued his report, dated July 22, 1988, recommending that the Union's objection be sustained and the second election set aside (G.C. Exh. ln). TSF filed exceptions. On November 14 the Board, adopting Hearing Officer Rustin's findings and recommendations, set aside the election and directed a third election (G.C. Exh. 1r). (The Board's decision is not included in bound volumes.)

On December 16, 1988, the third election was held. The official tally of ballots records the votes of the (approximately) 123 eligible voters as follows (G.C. Exh. 1s): For–40; Against–70.

The challenged ballots were insufficient in number to affect the results. The Union filed objections dated December 23 (G.C. Exh. lt) and on December 27, 1988, it filed the charge in Case 16–CA–13843 (G.C. Exh. 1z). Earlier I described the February 10, 1989 complaint, Respondent's answer, the February 13, 1989 order consolidating the cases for hearing, and that I presided at the hearing of these consolidated cases on April 10–11, 1989.

B. *Allegations and Positions on Procedure*

1. Allegations

As earlier noted, the complaint alleges that the Company violated Section 8(a)(1) of the Act by economic threats contained in three letters it sent to unit employees before the December 1988 election. The letters are dated September 9, November 18, and December 10.

It is undisputed that, as alleged, the September 9 letter (J. Exh. 2a) was sent to employees with a copy of the May 30 letter (J. Exh. 2b) attached (1:6–7). Complaint paragraph 7 alleges the letters threatened employees with job loss if they selected the Union as their bargaining agent. The Union's first objection alleges an ''implied'' threat of job loss plus the additional allegation the September 9 letter ''disparaged the neutrality of the National Labor Relations Board.''

Complaint paragraph 8 alleges that the November 18 letter (J. Exh. 3) ''threatened the employees with reprisals'' if they voted for the Union. The Union's corresponding objection, its Objection 2, is that TSF ''disparaged the neutrality'' of the Board and ''further repeated the implied threat'' that employees would lose their jobs if they voted for the Union.

Complaint paragraph 9 alleges that the December 10 letter (J. Exh. 4) ''threatened employees'' that if they selected the Union ''a strike would be inevitable and if they engaged in a strike they would risk losing their jobs.'' Objection 3 alleges the December 10 letter ''predicted the futility'' of selecting the Union and ''predicted the inevitability of a strike.'' Objection 4 adds that the December 10 letter misrepresented strikers' rights to recall. As I mentioned, the parties stipulated that the traditional misrepresentation concept is not involved in the case (1:42–45). Nevertheless, the Union is pursuing Objection 4 with the argument that the misrepresentation is in the nature of restraint and coercion (Br. at 6).

Objection 5 adds a ''catch-all'' objection by alleging that by ''other acts and conduct'' TSF destroyed the laboratory conditions necessary for a free and fair election. At the close of the hearing, the Union moved that its Objection 5 specifically include a speech TSF gave to unit employees over the 2-day period of December 13 and 14. The matter of the speech was fully litigated before me. Although initially objecting to the amendment, which I granted, the Company withdrew its objection (2:363–366). The Government's attorney, in his capacity as counsel for the Regional Office, represented that the Region had been unaware of the speech (2:366). The General Counsel does not specifically request any unfair labor practice findings based on the December speech.

Both the General Counsel and the Union request certain special remedies for the violations and objections alleged.

2. Positions on procedure

As can be inferred from the fact they rested without calling any witnesses after the formal papers, two stipulations, and the joint exhibits[9] were received in evidence, the General Counsel and the Union vigorously argued, and continue to argue in their briefs, that no evidence beyond those items should be considered (other than the December 1988 speech which was fully litigated). With equal fervor the Company contends that I was correct in overruling the objections of the Government and the Union and in permitting TSF to introduce certain news articles, some of which it referred to in the letters, and campaign materials. I received the evidence, and Respondent's exhibits, on the basis that I would resolve the relevance objections in this decision. TSF argues that I

[7] The Union's sole objection was that a May 30, 1988 letter TSF sent to unit employees impliedly threatened they would lose their jobs if they voted for the Union.

[8] In October 1987 the Board approved the General Counsel's plan to reorganize the Agency's field offices. Region 23 was abolished, and the Houston and San Antonio offices were converted to resident offices of Region 16 (Fort Worth). 126 LRR 107 (Oct. 19, 1987). The conversion was implemented in 1988.

[9] The only joint exhibits are the three letters plus the attached letter (J. Exh. 2b) of May 30, 1988. The joint exhibits skip the number one (1:27–29).

erred in not permitting it to go further, for it desired to elicit testimony on an even wider range of topics.

3. Preview of legal positions

The positions of the parties as to the scope of the admissible evidence reflects their view of the case law. Each side (counting the Government and the Union as aligned on one side opposing TSF) argues from its interpretation of the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–620 (1969), in which the relevant paragraphs read:

> Within this framework, we must reject the Company's challenge to the decision below and the findings of the Board on which it was based. The standards used below for evaluating the impact of an employer's statements is not seriously questioned by petitioner and we see no need to tamper with it here. Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ''threat of reprisal or force or promise of benefit.'' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that ''conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.'' 397 F.2d, at 160, 68 DR 2720. As stated elsewhere, an employer is free only to tell ''what he reasonably believes will be the likely economic consequences of unionization that are outside his control,'' and not ''threats of economic reprisal to be taken solely on his own volition.'' *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (C.A. 2d Cir. 1967).
>
> Equally valid was the finding by the court and the Board that petitioner's statements and communications were not cast as a prediction of ''demonstrable economic consequences,'' 397 F.2d, at 160, 68 DR 2720 but rather as a threat of retaliatory action. The Board found that petitioner's speeches, pamphlets, leaflets, and letters conveyed the following message: that the company was in a precarious financial condition; that the ''strike-happy'' union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such case would have great difficulty finding employment elsewhere. In carrying out its duty to focus on the question ''what did the speaker intend and the listener understand,'' Cox Law and the National Labor Policy 44 (1960), the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (l) that petitioner had no support for his basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and that he admitted at the hearing that he had no basis for attributing other plant closings in the area to unionism; and (2) that the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts.
>
> Petitioner argues that the line between so called permitted predictions and proscribed threats is too vague to stand up under traditional First Amendment analysis and that the Board's discretion to curtail free speech rights is correspondingly too uncontrolled. It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship, see *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 479 (1941). But an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in ''brinkmanship'' when it becomes all too easy to ''overstep and tumble into the brink,'' *Wassau Steel Corp. v. NLRB*, 377 F.2d 369, 372 (C.A. 7th Cir. 1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

The position of the General Counsel and the Union is that Respondent's three letters (with the May 30 letter an attachment) fail to pass the *Gissel* test because there is no causal connection, or correlation, between the plant closings and job losses mentioned throughout the letters. Thus, they agree, the Company's statements constitute unlawful threats because they are not phrased on the basis of objective fact to convey TSF's belief as to demonstrably probable consequences beyond its control. Accordingly, whether TSF had a good-faith belief in the truth or validity of its statements is irrelevant.

TSF's counter argument is basically: (l) It need not prove the truth of the newspaper descriptions because the news articles themselves constitute the objective fact specified in Gissel (2:308), and (2) nowhere in TSF's letters or speech does it say or imply that if the employees selected the Union TSF [unrelated to economic realities] would retaliate by closing its two stores and laying off the employees (Br. at 7).

C. *The Letters and the Speech*

1. Letter of May 30, 1988

As an attachment to the September 9 letter, the May 30 letter, from an allegation standpoint, must be construed as part of the September 9 letter. I list the May 30 letter first and separately, simply because it came first chronologically. Moreover, it is pertinent to note that the Board already has ruled that the May 30 letter is objectionable. That November 14 decision by the Board is a final disposition based on the facts there. Because the May 30 letter appears here in a modified factual context, it will be necessary to reconsider the letter's legality in light of the new factual context.

Signed by Jerry Savage as president, the May 30 letter begins by reminding the employees (the letter was addressed individually) of the election hours on that Friday, stresses the importance of the election, and asserts (J. Exh. 2b):

> *YOUR NO VOTE* against the union may be critically important as to whether or not *YOU* and *I* have a *Job*.

The second paragraph labels the Union's picketing of the grand opening of the LaMarque store as illegal and states that, by so doing, the Union tried to force the employees into union representation without a vote. In the third paragraph Savage, referring to the Union's ''unlawful'' demand for recognition without an election, states that the Union lied in writing by falsely claiming it represented a majority of eligible employees, and that the ''NLRB, an impartial federal agency,'' determined the Union's claim was a lie and that the picketing was unlawful. The next three paragraphs read:

> Now, just a few months later, this very same union, in letters, harassing telephone calls and home visits, now *falsely* claims that it wears a white hat and that its intentions are pure. *AND THIS JUST A FEW MONTHS AFTER THE UNION TRIED UNLAWFULLY TO DESTROY TEXAS SUPER FOODS AND YOUR JOB AND MINE*!!!
>
> What the Union has been and *Is Now Trying To Do To You* right here in LaMarque and Texas City is to *Put You Out Of Work* just like the union has done to thousands upon thousands of other employees in Texas and elsewhere throughout the United States. THE UNION CANNOT TRUTHFULLY DENY THAT IT IS THE PRINCIPAL CAUSE OF WEINGARTEN, KROGER, SAFEWAY AND OTHER GROCERY EMPLOYERS BEING FORCED TO CLOSE HUNDREDS UPON HUNDREDS OF RETAIL GROCERY STORES CAUSING THOUSANDS UPON THOUSANDS OF EMPLOYEES TO LOSE THEIR JOBS.
>
> I don't want to see this happen at Texas Super, and I hope that you don't either.

The final three one-sentence paragraphs invite the employees to vote *NO* and to keep the Union and its ''henchmen'' out. As I mentioned, the letter (as are all the letters involved here) is signed by Jerry Savage, president.

2. Letter of September 9, 1988

The September 9 letter is a lengthy 2.5 pages. The first three paragraphs assert that Union Representative Roy Davila refuses to accept the vote of the employees in the August 1987 and June 3, 1988 elections saying No to ''the very same union which has caused so much unhappiness and loss of jobs for so many employees at other grocery companies.'' Davila and the Union, the third paragraph continues, will do everything in their power to convince the NLRB that you should play ''Russian Roulette'' with a loaded gun of forced union dues and membership and (J. Exh. 2a):

> the very real possibility that the union would put all of us out of work just like it has done for thousands of other employees in Texas and elsewhere.

The fourth paragraph asserts that Davila and the Union have convinced a ''friend'' of theirs at the Labor Board that the May 30 letter, ''a copy of which is attached,'' is objectionable. Nevertheless, Savage continues, the May 30 letter is truthful and nonthreatening despite what some ''union puppet'' at the Labor Board may say. In the next paragraph, the last one on the first page, Savage states that in the May 30 letter he merely reminded TSF employees of the Union's unlawful picketing, that its purpose was to force TSF to recognize it on to force TSF out of business, and:

> to remind our employees, what they had already read in the Houston Chronicle and other newspapers, that the union's demands had forced Weingarten, Kroger and Safeway and many other employers to close many grocery stores and to terminate thousands of employees. In fact, in our June 1, 1988, preelection speech, we distributed copies of two of these newspaper articles to all employees for review. The Houston Chronicle Article dated September 6, 1987, said that the union had caused Safeway to close 331 grocery stores and to terminate thousands of employees in Dallas and elsewhere throughout the United States.

In an effort to link the store closing and job loss statements to the Union's picketing of the grand opening of TSF's LaMarque store, Savage continues on the second page as follows:

> The union's illegal blackmail picketing of our grand opening caused Texas Super to lose business and to terminate employees, *BUT THIS IS EXACTLY WHAT THE UNION INTENDED THE PICKETING TO DO*! The union wanted to either force us out of business or to force us to unlawfully recognize the union without an election, even though it did not represent a majority of our employees.
>
> These objective facts about the union are well-known to those employees who were with us at that time, and were the reason for my comments in the May 30 letter that: ''and *YOUR NO VOTE* against the union may be critically important as to whether or not YOU and I have a JOB,'' ''*AND THIS JUST A FEW MONTHS AFTER THE UNION TRIED UNLAWFULLY TO DESTROY TEXAS SUPER FOODS AND YOUR JOB AND MINE*!!!, and ''what the *UNION* had been and *IS NON TRYING TO DO TO YOU* right here in LaMarque and Texas City is to *PUT YOU OUT OF WORK* just like the union has done to thousands upon thousands of

other employees in Texas and elsewhere throughout the United States.''

In addition, during its propaganda campaign before the June 3 election, the union distributed a cleverly worded but erroneous handbill which falsely accused Texas Super of threatening employees with layoff or store closure. When Texas Super found out about this, we handed out to each employee voter a June 1 open letter to the union denouncing the union's handbill as totally false and state as follows: ''The Union is threatening employees! Not Texas Super! . . . you and other union organizers (the letter was addressed to Davila and the union) have falsely accused Texas Super *but the Union and its agents are the only ones threatening and lying.*''

In the final paragraph of the second page, Savage contends the hearing officer's recommendation is erroneous, that the May 30 letter was not a veiled threat, and that the objective facts are what the Union had done in its 3 weeks of ''illegal blackmail picketing'' of TSF and what:

> the union had admittedly done, as announced in the Houston Chronicle and other newspapers, at various other grocery chains which resulted in the termination of thousands of employees.

On the letter's third and last page Savage repeats his contention that the May 30 letter is truthful and contains no threats. He then continues his attempt to blur the distinction between the Union's picketing at the LaMarque store's grand opening and newspaper references to store closings. The final three paragraphs read:

> As I said in the fourth to last paragraph of the attached May 30 letter, ''I don't want to see this happen at Texas Super, and I hope that you don't either!'' THIS STILL HOLDS TRUE!
>
> Based upon what the union has already done at Texas Super by its three weeks of picketing during our grand opening as well as what the union has admittedly done in forcing the closing of hundreds of grocery stores and the termination of thousands of grocery employees in Texas and throughout the United States, we think the union would force Texas Super to close its stores. We think the union would cause us all, you and I, to lose our jobs permanently!
>
> We don't need or want the damn union here in our little two store operation, and I hope that you continue to feel as I do.
>
> Sincerely,
>
> /s/ Jerry Savage
> Jerry Savage, President

3. Letter of November 18, 1988

The November 18 letter from Savage is short. Savage opens by informing the employees that the NLRB had decided there should be another election, and that the (third) election probably would be held in December. The balance of the letter reads (J. Exh. 3):

> The NLRB thought that a letter I wrote which truthfully described the Union's illegal blackmail picketing [sic] at the Grand Opening of our La Marque Store, to force Texas Super *To Force You* to join the Union, and the truthful newspaper account of the Union causing Weingarten, Kroger, Safeway and many other employers to close their doors and to fire thousands of employees in Texas and elsewhere, was objectionable because it sounded like an implied threat that Texas Super would close its stores.
>
> There was no implied threat, either stated, intended or implied. Since when is it a threat to merely tell truthfully the bad things the Union has done to employees? I ended that letter by saying, ''I don't want to see this happen at Texas Super, and I hope that you don't either.''
>
> The fact of the matter is that the Union is the one that has been threatening employees and putting their job at risk, *NOT TEXAS SUPER*!
>
> *The Union is Dangerous*. Last time the Union tried to bribe you with drinks and pizzas. What will they try this time?
>
> *You* beat the Union twice before and *You* can do it again!

4. Letter of December 10, 1988

The December 10 letter (J. Exh. 4) is a long 3.5 pages, single-spaced, and attached a photo of a letter to ''The Houston Post'' of March 21, 1975. The 13-year old published letter is from the wife of a striker. Beginning ''who really benefits from a strike?'', the wife, trying to support the family on her pay as a nurse, complains of several matters, and concludes by asserting it is unfair for the union representative, whose salary continues during a strike, to tell the workers the company is unfair.

The letter from Savage opens with a capitalized statement that the Union is on strike. In the following paragraphs Savage makes heavy references to strikes, and he describes the Union as ''*STRIKE HAPPY*!!!'' Savage then mention a 3-week strike in February 1987 by the Union's Local 408 (the meat cutters local). He asserts that when (the employees) returned to work it was to the tune of a $2.05 pay cut and reduced benefits.

Beginning on the second page with a paragraph referring to the Union's June 1987 picketing of TSF, Savage begins a list describing purported strikes by the Union (by locals other than 455) around the country. These references include a 12-month strike against Hormel in which hundreds of union members ''LOST THEIR JOBS'' when Hormel lawfully replaced them. On page 3 the listing ends with item (8) reading:

> (8) over the last few years, the union's hard nose bargaining position was the principle [sic] cause of weingarten, kroger, safeway and many other grocery employers being forced to close hundreds upon hundreds of grocery stores causing thousands upon thousands of union employees to lose their jobs.

''The point of all this,'' Savage continues in the next paragraph, is that the itemized strikes by the national union are just a few of the ''*many union strikes*'' in the past few years.

The union employees did not know what they were getting into, and their mistake cost them a great deal of money, a great deal of hardship, ''and many jobs!''

''Strikes are a lonely and tough business,'' Savage contends in the penultimate paragraph of page 3. Wages and benefits stop for strikers, and there is no unemployment compensation. And:

> *YOU* risk losing your job, if Texas Super, as the law permits it to do, hires someone else to replace *YOU*. Strikes are no fun!!

In the Union wing and (contract) negotiations begin, Savage continues at the bottom of page 3 to the top of page 4, Roy Davila and other (organizing) representatives will be replaced by a stranger. While Davila and the other organizers ''might drive by every once in awhile to visit you on the picket line'' to give encouragement and perhaps a CARE package, they ''will not lose their jobs.''

The concluding paragraph, urging the employees to vote *NO* on December 16, is immediately preceded by the statement:

> *A VOTE FOR THE UNION MAY BE A VOTE TO STRIKE*.

5. Speech of December 13–14, 1988—and the news articles

a. *Delivery Procedure*

There is no dispute that during the 2-day period of December 13–14 TSF representatives delivered a speech to unit employees. The text of the speech in evidence is 33 pages, triple-spaced (R. Exh. 28). LaMarque Store Manager Joseph F. Masson testified (2:229), and Savage confirms (2:335), that the speech was given to small groups of 6 to 10 employees in the back of the stores (2:236). Although Savage personally gave the speech about twice (2:335), store Managers Masson and Aguilar delivered it to most of the groups (159–160; 2:227). Masson testified it took him about 50 to 55 minutes to deliver the speech (2:235). This included reading the headlines of the several news articles, and reading from some of the news articles, that Masson and the others, during the speech, circulated for the employees to read. Masson would pause for 2 to 3 minutes as the employees read each article (sufficient copies were available for each attending employee to hold one). At the conclusion of each speech TSF gathered up the copies of the news articles for use with the next group of employees (1:159; 2:228–231, 246–247).

b. *Contents*

After some opening remarks as to the purpose of the speech (to give the truth about the national union and to counter its lies and big promises), and remarking that the ''union seems to have enough influence to get elections overturned'' but not enough appeal to the employees to win an election, the speech describes an election the national union (United Food and Commercial Workers Union or UFCWU) lost in North Carolina. It then asserts that apparently some of TSF's employees who are union supporters cannot get a better job of more pay and benefits elsewhere, yet they ''constantly bad mouth Texas Super. If the union ever did win an election here at Texas Super, these are the kind of people that the union would choose to be union stewards.'' This is followed by a paragraph reading (R. Exh. 28 at 4):

> This is one of the reasons why were [sic] are fighting so hard to keep the union out of our small, two store operation. With the economic depression that we are going through, and with the strong competition that we have to face, we just can't afford to come to work each day and have to spend a lot of time arguing with the stupid union over something that is not even a problem.

Citing *Louis Gallet, Inc.*, 247 NLRB 63 fn. 1 (1980), the Union argues (Br. at 7) that the ''can't afford . . . to spend a lot ot time arguing with the stupid union'' statement, in the context of the full speech, is an implied threat of job loss in that if the employees selected the Union TSF would have to spend its time fighting the Union rather than doing the tasks needed to remain competitive and to keep the stores open. The quoted paragraph is immediately followed by one asserting that unions destroy jobs:

> In one of our notices that we distributed to you, we stated that the vast majority of American working men and women, some 100 million or more strong, are not union members. These are true figures taken from U.S. government publications. The reason why these 100 million or more working American working men and women have not joined a union is that they realize that unions do not create jobs, they destroy them. Unions do not create good benefits and pleasant working conditions, unions destroy them.

After a page or so of comments about right-to-work laws, and the national union's efforts to abolish them, TSF asserts in the speech (R. Exh. 28 at 6):

> The most important reason why Texas City, LaMarque, Baytown, Pasadena, Galveston and, in fact, this whole area down here has had such a tough time economically in the last few years—you could even call it a serious depression—is because the damn unions have a strangle hold on various employers and wouldn't let go, even if it meant that those employers had to shut down their businesses or drastically reduce the number of employees.

Further on in the speech TSF repeats some of the strike information from the December 10 letter. The Company turns to the news articles with these introductory remarks at pages 18–20:

> I have here before me various newspaper and other articles that widely publicize the fact that the United Food and Commercial Workers Union has been directly responsible for the closing of hundreds of retail grocery stores and the termination of thousands upon thousands of employees in Texas and elsewhere throughout the United States. And these are just the newspaper articles that we have been able to gather. There may be many more which reflect store closings and layoffs of union employees throughout the country. I have these articles right here and I am going to pass them around so that

> you can see for yourselves. Although the United Food and Commercial Workers Union has never denied the truth contained in these newspaper articles, the union some how or other convinced the NLRB that the mere mentioning of these articles was somehow a threat by Texas Super. The NLRB can't read common English and they don't even understand their own case law. In any event, let us assure you right now that we are not threatening you in any way. We are merely showing you these articles. You make your own decision about the United Food and Commercial Workers Union. I will describe each one of these articles as you are looking at them.

Then begins a description of nine numbered news articles. (The number reaches only eight because the number five is used for two articles.) These are followed by reference to a 10th, but unnumbered, article in the Bureau of National Affairs Daily Labor Report for March 11, 1988.

The first article is from the Houston Chronicle of July 19, 1984 (R. Exh. 16). Bearing the headline ''Kroger to sell off 70 stores in Mich. after pact rejected,'' the article quotes Kroger as announcing it will close 70 Michigan stores and sell them to smaller chains because workers of UFCWU Local 376 failed to make $65 million in concessions. According to the article, some 4200 Kroger clerks and cashiers would lose their jobs, and that in the previous month Kroger closed 65 stores in Michigan because workers there refused to grant concessions.

The second article (incomplete) is from the Houston Chronicle of June 10, 1987 (R. Exh. 17). It bears the heading ''7 Safeways to be shut here; 9 more possible.'' According to the article, ''The company said the closings are part of its ongoing program to eliminate stores that are not performing well.'' Nothing in the exhibit attributes any cause for the closings to Local 455 or to any bargaining demand or position of the Union.

The third article is from a June 15, 1987 issue of the Bureau of National Affairs, Daily Labor Report (R. Exh. 18). In reporting on job losses and severance pay when Safeway closed 131 stores, the article asserts, in part:

> Some 5,000 union-represented employees in Texas who lost their jobs this past spring when the company closed 131 stores in its Dallas division will be the first beneficiaries of the new severance agreement, the union said.

As with the second article, this one contains no assertion that the store closings or job losses stemmed from contract demands by the UFCWU or refusals of members to grant concessions in negotiations.

The fourth article, from a September 6, 1987 issue of the Houston Chronicle, is headlined ''Safeway management trimming fat from budget to keep up with debt.'' (R. Exh. 19.) The article quotes Safeway's chairman as saying the company, in the past year, had closed 331 stores and laid off more than 8600 employees. The article attributes some of the store closings to the failure of Safeway to win wage concessions from union represented workers. In its speech TSF states:

> It is clear from this article that Safeway was selling or closing these unprofitable stores because the United Food and Commercial Workers Union would not grant the needed substantial wage and benefit reductions. (Here pause and let the employees read the article.)

The fifth article, from a May 1988 issue of The Wall Street Journal, describes supermarket closings in Quebec, Canada, by Steinberg, Inc. when the UFCWU rejected a proposed wage-concession package (R. Exh. 20).

The sixth article, from the May 26, 1988 Houston Chronicle, is a followup on Safeway and is headlined ''11 former Safeways bought here.'' (R. Exh. 21.) There are no references to a union or to contract concessions. The speech states that the article describes a purchase of about 300 former Safeway stores—including 11 in the Houston area—by a Dallas company. It then paraphrased a statement in the article that the stores had been taken out of operation in recent years ''because they were underperforming.R (R. Exh. 28 at 22) The article itself quotes a Safeway spokesman as saying ''mostly because they were underperforming.''

The seventh article (R. Exh. 22), from the May 31, 1988 Wall Street Journal, is a followup to the fifth article. This article begins with a report that Steinberg is expected to renew its efforts to sell its core supermarket assets following rejection by members of a UFCWU local, which represents 8000 Steinberg employees in the Montreal area, of the company's proposed concession package. ''Steinberg management has complained for some time that low profits from its supermarket units result from wages and benefits that are more generous than those of competitors,'' the article reports. And, ''The company said it would await the outcome of votes by its unionized workers in Ontario before deciding the fate of its supermarkets there.''

The eighth article is from the Houston Chronicle of June 14, 1988, with the headline ''Local firm to bur 99 Safeway stores.'' The article reports the purchase of 99 Safeway stores in the Houston region, including about 50 stores in metropolitan Houston. After giving a brief history of Safeway's problems and store sales which have marked its efforts to pay off debts from a $4 billion leveraged buyout in 1986, the articles states (R. Exh. 23):

> Safeway has struggled to survive in the competitive Houston marketplace in recent years, and the grocery giant has obtained wage concessions from its unions to make the Houston Safeways more profitable.

The speech did not mention that quotation. Instead, it recites other points, including Safeway's selling the 99 stores plus 140 stores a year earlier in the North Texas market.

''Auction set for six shut Krogers here'' headlines the ninth article, a report in the Houston Chronicle of November 15, 1988 (R. Exh. 24). The brief article states that most of the stores have been closed for several years. There is no reference to a cause for the stores having closed, and there is no reference to a union or to proposed wage concessions.

As I described earlier, the 10th article, apparently not circulated among the employee groups, and not offered in evidence before me, is simply described in the speech. The reference there is to a BNA article dated March 11, 1988. The report in the speech, after identifying the BNA source, tells the employees that the article (R. Exh. 28 at 23):

> states that some 2,000 employees at 52 Big Star supermarkets in North Carolina, South Carolina and Virginia would lose their jobs as a result of the Grand Union Company's sale of the stores to a nonunion chain based in Charlotte, North Carolina. This article relates that the United Food and Commercial Workers Union was in the process of negotiating with Grand Union over the effect of the closing. The sale agreement does not obligate the nonunion chain to hire the union employees.

After reviewing these 10 articles, the TSF speech then states (R. Exh. 28 at 23–24):

> In one of its recent handouts, the union asked the question: ''When was the last time you got a raise?'' Those thousands upon thousands of union employees, who had paid union dues for years, and who have been terminated when their stores closed in Texas and elsewhere, have a much bigger problem. With those union members, the question is not when they got their last raise, but when they will get a new job. If being a member of the United Food and Commercial Workers Union meant steady and secure jobs with regular pay increases, why were these thousands upon thousands of United Food and Commercial Workers members terminated. Those terminated, had no jobs and no benefits, and no place to go.

The speech then asserts that TSF's salaries ''compare favorably with any union store,'' and the TSF employees do not have to suffer union harassment, dues, ''the constant threat of a union strike and the constant threat of store closings and terminations.''

Over the next two pages the speech addresses certain arguments advanced in the Union's campaign material and then asserts (R. Exh. 28 at 26–27):

> You will notice that Davila does not talk about the hundreds of union grocery stores that have been shut down and the thousands upon thousands of union employees who have been terminated in the State of Texas and elsewhere. In many of those situations, the United Food and Commercial Workers Union refused to agree to cut the union's unreasonable wage and benefits demands so that those stores could remain open and the employees could have their jobs.

Over the next few pages the speech asserts that TSF has tried to remain competitive, does not have the money suggested by a union cartoon-leaflet, and that ''most of the time we don't make any money at all.'' The speech continues by asserting that once TSF had five stores, but TSF's grocery business, as the grocery business in general, has fallen on hard times. TSF, the speech reports, has been fighting to survive, and it has not been easy even without a union. ''Fleming'' (apparently a grocery wholesaler) ''keeps us afloat, but there is always the threat they and other suppliers will place us on COD. That is, CASH ON DELIVERY. If we are placed on COD, we would have to pay cash for anything that we buy from Fleming or from our other suppliers. Frequently, Texas Super does not have the money to do this. Even now, when Fleming sends us groceries, Texas Super has to pay Fleming the very next week.''

Nevertheless, the speech continues, TSF's average grocery salaries are very competitive with union stores, and the group insurance plan is far better than the union plan. Asserting that because the costs of union insurance and pension plans are ''staggering,'' it makes TSF believe that ''somebody in the union must be pocketing some of the money.'' This immediately leads into the last two pages of the speech which are devoted to the message that although the general area around LaMarque and Texas City is still in a depression, with many businesses closed and employees looking for jobs, and despite TSF's economic problem, TSF has tried to do its best for its employees. According to the speech, TSF employees enjoy far better job security than some union members have. With Texas slowly getting on its feet, and if TSF can keep its head above water, then it will survive and eventually there will be better times to be shared by TSF and its employees. The speech concludes by asking the employees to VOTE NO and by thanking them for their attention.

D. *Testimony About Economics*

Union Representative Roy Davila testified that contractual wages paid by the Houston ''majors'' (Kroger, Safeway) average about $8.50 to $9 an hour, $8 to $8.50 at the ''minors'' (Gerlands and Rice), and about $7.50 at the smallest independent, Lewis & Coker. However, both the major and minor supermarkets, under contract with Local 455, have the same pension and health and welfare benefit plans (1:80–81, 87–88, 121).

Joseph E. Masson, the LaMarque store manager, testified that TSF pays its grocery employees an hourly average of $5.50,[10] and that TSF cannot afford to pay an average wage rate of $8.50 nor can TSF afford the Union's benefit plan (1:169). Union Representative Davila's understanding from TSF's employees is that the Company has no pension (1:78–79).

Jerry Savage, TSF's president, estimates the additional cost to TSF of a $3 difference in wages ($5.50 to $8.50) at about $600,000 a year (2:322). The pension would add approximately $70,000 a year, and the health and welfare would increase Respondent's cost by another $77,000 (2;316–319). Even without estimating any additional costs for vacations, holidays, or daily overtime, the total additional costs estimated by Savage reach the total of some $750,000 a year. According to Savage, TSF cannot afford a union (2:324).[11] Indeed, Savage testified TSF lost $500,000 in 1987 and $600,000 in 1988 (2:348). He testified that if TSF were saddled with these additional costs from a union contract that the Company would be out of business in 6 months (2:324).

As Savage concedes, Local 455 has never presented TSF with any specific bargaining demands (2:347). And as Union Representative Roy Davila testified, the Union wants to keep employers in business (1:119–120). Nevertheless, copies of the Union's campaign literature in evidence reflect that the Union, although principally stressing the theme of ''Get It In Writing,'' also suggested that TSF employees could improve their pay and benefits (including a pension plan) through a union contract (R. Exhs. 2–14, 25–27).

[10] TSF President Savage apparently confirms that figure (2:321).

[11] Savage was unwilling to produce TSF's books at the hearing to substantiate his testimony (2:325–326).

E. *Analysis and Conclusions*

1. Factual analysis

The General Counsel argues that the clear message TSF delivered, time and again, is ''if you vote for the Union you won't have a job.'' And, ''the letters . . . clearly and unequivocally equate the Union with a promised loss of employment.'' (Brief at 10.)

Observing that the news articles involve other companies, and that the letters repeatedly state that the Union caused hundreds of stores to close and thousands of employees to lose their jobs, the Union argues: ''The missing element is the lack of explanation as to how this could happen. The letters are filled with rhetoric stating, in effect, that a union at Texas Super means that the stores will close and the employees will lose their jobs. The objective facts and the causal connection are totally absent.'' (Br. at 8–9.)

Much of Respondent's factual argument depends on the testimony of Savage and Masson concerning TSF's inability to pay the union wages and benefits prevailing in the area. That reliance leaves TSF with something of a problem because I do not credit either witness. Masson seemed to phrase or switch his answers to questions (particularly in response to leading questions) in a manner suggesting that he was more interested in responding as Respondent's counsel desired than in being forthright. Moreover, his demeanor was poor. I do not believe him.

The demeanor of Jerry Savage was completely unfavorable. His demeanor was so unfavorable that I am convinced he testified falsely. I do not believe him.

The thrust of TSF's letters of May 30 and September 9, 1988, is to equate unionization with forced store closings and loss of jobs. The text expressly accuses the Union (even considering it as the national union and its locals) of being the ''principal'' cause of Weingarten, Kroger, Safeway, and other grocery employers having to close hundreds of stores and thousands of employees to lose their jobs.

TSF's reference in the September letter, to the Union's picketing does not neutralize its unsubstantiated charge that the Union had ''admittedly'' forced the closing of hundreds of stores ''and the termination of thousands of grocery employees in Texas and throughout the United States.'' This unsubstantiated statement, with the picketing reference, does not justify the expression of opinion which immediately follows, ''. . . we think the union would force Texas Super to close its stores. We think the union would cause us all, you and I, to lose our jobs permanently!''

The November 18 letter, issued after the Board decision finding that TSF had made an objectionable threat by its May 30 letter, simply repeats its unsubstantiated accusation that the Union had caused Safeway and others to close.

This unsubstantiated theme is repeated in the December 10 letter in item (8). The December letter otherwise is principally the vehicle of the message that a vote for the Union is a vote for a strike (notwithstanding the ''may be a vote to strike'' phrase also contained in the letter).

The speech repeats the store closings and job losses in spades. The news articles are nothing more than hearsay quotes from various sources and do not serve as evidence for the truth of any statements in the articles. Thus, the articles do not constitute factual substantiation of assertions in either the speech or the letters.

2. Legal analysis

a. *Job losses through store closings*

Although the news articles do not constitute factual substantiation for the letters and the speech, do they qualify as ''objective fact''? As noted, Respondent contends the content of the articles need not be proved because the articles (facially) constitute objective fact (2:308; Br. at 6, 17, 20, 23).

Even if the articles do serve as ''objective fact'' on which to base a prediction, *Gissel*[12] requires that the prediction must convey an employer's ''belief'' as to ''demonstrably probable consequences beyond his control.'' As the Union argues, the ''missing element'' is the lack of explanation how the loss of jobs elsewhere would equate to a loss of jobs by TSF employees. The closest TSF comes to an explanation is its statement that the articles show that the UFCWU refused to grant concessions and therefore the stores were sold or closed entailing the loss of thousands of jobs. The implication is that Local 455 likewise would refuse to grant concessions with a similar result of the loss of jobs by TSF employees.

TSF fails to mention (although most of the articles state) that the members of the local unions voted to reject the proposed concession packages. It was not the national union acting on its own behind the backs of the locals' members. The articles also contain references to instances where concessions were granted, and even then some of the stores had to close. The upshot is that the articles do not serve as ''demonstrably probable consequences beyond'' TSF's control.

Does that mean TSF's letters and speech fail to pass the *Gissel* test? Citing cases such as *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988), the General Counsel and the Union say the answer is yes. TSF argues to the contrary, relying on cases such as *NLRB v. Shenanigans*, 723 F.2d 1360 (7th Cir. 1983).

Although none of the letters or the speech contain an express threat that TSF would retaliate by closing, *Gissel* deems store closings and job loss predictions to be threats if the predictions are not carefully phrased on the basis of objective fact conveying the employer's belief as to demonstrably probable consequences beyond its control.

The letters contain no objective facts. At most they rely on general references to newspaper articles (the December 10 letter in item (8) does not even do that), and only the September 9 letter refers to a specific news article, that of the September 6, 1978 Houston Chronicle. From the date of the paper and the reference to Safeway's closing of 331 stores, it is apparent that the reference is to Respondent's Exhibit 19. The thrust of that article is that Safeway went heavily into debt in a leveraged buyout to fight off a takeover attempt by the Haft family. ''Like the scores of other corporations that have undergone similar leveraged buyouts, Safeway's bottom line remains in the red because of the interest payments the company incurred from the buyout. With interest expenses of $295 million for the first half of the year—nearly four times as high as last year—Safeway lost $78.7 million in the first half of this year.'' (R. Exh. 19, col. 2.)

[12] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 71 NLRB 2481, 2497–2498 (1969).

Although the Houston Chronicle article goes on to report that Safeway has closed unprofitable stores, including stores where union members would not agree to concessions, it also reports that Safeway obtained concessions in some areas. In any event, it is clear from the article that Safeway's money crunch comes from the burden of servicing its enormous debt—and not from any demands of the UFCWU or refusal by union workers to grant concessions. None of this is in the September 9 letter which, as I quoted earlier, seeks to frighten TSF's employees by stating it was ''the union'' that had ''caused Safeway to close 331 grocery stores and to terminate thousands of employees in Dallas and elsewhere throughout the United States.'' (J. Exh. 2a at 2.) The plain fact is that such statement by Savage is a false report of what is written in the September 6, 1987 article. I find that the letters do not meet *Gissel*'s standard for lawfulness.

TSF's December speech likewise fails to pass muster. The articles do not constitute objective fact, but even if they did they are not a ''demonstrably probable'' showing of consequences beyond TSF's control. All that would happen from a union election victory would be an obligation by TSF to bargain in good faith—not an obligation to agree to whatever demands Local 455 presented. And of course, Local 455 has presented no contract demands. I find that the speech conveys the threat of job loss by equating the selection of the Union as a vote for store closings with consequent job losses. In the process of conveying that threat, TSF manages to insult the Board as illiterate (''can't read common English'') and stupid (''don't even understand their own case law'') (R. Exh. 28 at 19).

The *Gissel* test refers to the employer's belief. As described earlier, I declined (2:305, 308) to accept the proposed stipulation of the parties that TSF (that is, Jerry Savage) believed in good faith that it was the Union's (UFCWU) high wage demands and refusals to grant concessions that forced all the grocery stores out of business (2:299–301). Also as I have summarized, Savage testified to his good-faith belief that TSF cannot afford a union and that everything TSF told its employees is true (2:324, 362).

Having found Savage unworthy of belief as a witness, I find that he intentionally get about to terrorize his employees by his letters and in TSF's speech. The technique he used for this was to equate unionization with store closings and the loss of jobs. I find that Savage did not believe a union victory at TSF would result in the closing of TSF's two stores and the loss of jobs. Savage, I find, acted for the bad-faith purpose of striking fear into the minds of his employees so they would vote no—with a no vote eliminating the time and trouble of the Union's presence that a yes vote would bring. For this additional reason, I find that the letters and the speech of TSF fail the *Gissel* test.

b. *Job losses through strikes*

Arguing that the December 10 letter is not an unlawful threat that strikers will lose their jobs, Respondent cites *John W. Galbreath & Co.*, 288 NLRB (1988), and *Eagle Comtronics*, 263 NLRB 515 (1982). Neither case supports Respondent's position. In *Eagle Comtronics* the Board held that an employer may give a truthful, although incomplete, statement respecting the permanent replacement of striking employees. However, the Board distinguished cases in which the employer went beyond the risk of replacement and told employees they would lose their jobs. 263 NLRB 516 fn. 8.

At issue in *Galbreath* (a representation case) was an employer's statement that strikers, through replacement, can lose their jobs. The employer added, however, ''they are not discharged, technically speaking.'' It was this addition which saved the employer's statement from being held objectionable.

Here TSF's remarks have no savings clause. Thus, employees are told, on page one, that ''the only thing the union can usually promise is trouble, strife, strikes and loss of jobs.''

Following item (8) and the *false* history of the Union's bargaining position being the principal cause of several grocery employers closing thereby causing thousands upon thousands of union employees to lose their jobs, Savage states that union employees mistakenly did not know what they were getting into with the many union strikes and it cost them ''many jobs.'' This is followed by a separate paragraph about strikes being a lonely and tough business and ending with, ''*YOU* risk losing your job, if Texas Super, as the law permits it to do, hires someone else to replace *YOU*. Strikes are no fun!!!'' (J. Exh. 4 at 3.)

After referring to union representatives visiting strikers on the picket line, the letter from Savage states, in capitalized and underscored words, that a vote for the Union may be a vote to strike. Respondent contends the ''may'' insulates the statement (Br. at 27). I find that it does not.

I find that the thrust of TSF's letter is to tell employees that if they strike they will *lose* their jobs. Such a statement is an unlawful threat. *Eagle Comtronics*. Moreover, the context of a job-loss-by-store closing threat is itself sufficient to impart an unlawful character to the job-loss-by-strikes message. *Great Dane Trailers*, 293 NLRB 384 (1989).

3. Conclusion

For these reasons I find merit to complaint paragraphs 7, 8, and 9 and to the Union's objections 1, 2, 3, 4, and 5. Objection 4 is phrased in terms of misrepresenting the recall rights of strikers,[13] but, in effect, alleges objectionable restraint and coercion, as argued by the Union (Br. at 6). I find merit to Objections 3 (the December 10 letter predicts the inevitability of a strike) and 4 in combination. So combined, they allege essentially as complaint paragraph 9.

The Union amended its Objection 5 to include TSF's December 13–14, 1988 speech. I find merit to this objection on the basis that the speech threatens employees with logs of their jobs through store closings if they select Local 455 as their bargaining representative.

Although the General Counsel did not move to amend the complaint to allege that TSF violated Section 8(a)(1) of the Act by the job loss threat in its December 13–14, 1988 speech, the matter was fully litigated. Accordingly, I find that TSF did so violate the Act.

CONCLUSIONS OF LAW

1. Respondent TSF is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

[13] By the statement, ''*YOU* risk losing your job, if Texas Super as the law permits it to do, hires someone to replace *YOU*.''

2. The Union, UFCWU Local 455, is a labor organization within the meaning of Section 2(5) of the Act.

3. TSF violated Section 8(a)(1) of the Act by the following conduct:

(a) By its letters of September 9, 1988 (with May 30, 1988 attachment) and November 18, 1988, and its December 13–14, 1988 speech to unit employees, threatening unit employees with loss of their jobs if they selected Local 455 as their bargaining representative.

(b) By its December 10, 1988 letter threatening unit employees with loss of their jobs by telling them that if they selected Local 455 to represent them a strike would be inevitable and strikers would risk losing their jobs.

4. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. By the unfair labor practices and other conduct found, as described in part III,E,3 of this decision, Respondent TSF engaged in objectionable conduct requiring that the results of the third election be set aside and a fourth election directed.

6. The following unit is a unit appropriate for collective bargaining within the meaning of Section 9(c) of the Act.

> All employees of Texas Super Foods, Inc. at its Texas City and LaMarque, Texas grocery stores, *excluding* all meat department employees, office clerical employees, salaried employees, and supervisors as defined in the Act.

REMEDY

The General Counsel (Br. at 12–13) and the Union (Br. at 9–11) request special remedies because of Respondent TSF's repeated conduct requiring new elections. Both seek an order compelling access and equal time, and the Union also requests reimbursement for litigation expenses and organizational costs ''at least in connection with the third election.''

In considering the appropriate remedial order, I note that the letters in issue are signed by TSF's president and owner, Jerry Savage, that Savage personally gave the December speech to two of the employee groups (2:335), and that he participated in drafting the speech (2:347–348). The obvious impact of the Company's president and owner so forcefully, and personally, making TSF's unlawful statements cannot be overemphasized.

Because Savage personally signed the unlawful letters, and personally gave or authorized the unlawful speech; because Savage's unlawful conduct extended to every member of the bargaining unit; and because Savage's conduct destroyed the conditions for holding a fair *third* election in December, the taint effect of owner Savage's conduct cannot be overcome by anything short of extraordinary measures. I therefore shall order that Jerry Savage personally sign and read the attached notice to employees to small groups of employees, assembled for that purpose only, and in the presence of an agent of the Board and of the Union if the Regional Director and Local 455 so desire; that TSF, on request, grant the Union access to the Company's bulletin boards during the period between the Board's adoption of this order and the time of the fourth election; that TSF, upon request, grant the Union and two of its representatives (per store) access to TSF's employees during the employees' nonworking time in nonwork areas of Respondent's LaMarque and Texas City stores during the time frame before the fourth election, and that it grant the Union, and two representatives it designates, on request, reasonable notice of and access to attend group meetings, small or otherwise, held before the fourth election, at which TSF addresses employees on union representation, with the Union to have the opportunity and facilities for an equal time response to TSF's address by a representative or representatives the Union designates.

So that the Union will have the opportunity to dispel the effects of Respondent's unlawful messages even if TSF does not address its employees before any new election, TSF must grant the Union, on request, access to its two stores (one or two representatives per store, at the Union's option) to deliver a 30-minute speech, on issues pertaining to the fourth election, to small groups of employees (during their normal working time) in a time frame of not more than 10 working days before, but not less than 48 hours before, the fourth election. TSF took a calculated risk when it disregarded Hearing Officer Rustin's July 22 report and republished its May 30 letter as an attachment to its September 9 letter. TSF lost that gamble when the Board, on November 14, adopted Rustin's report. By its letters of November 18 and December 10, and particularly by its speech of December 13–14, 1988, Respondent TSF again republished the earlier letters of May and September and blatantly disregarded the Board's November 14 decision. In effect, Respondent TSF publicly insults the Board (as illiterate and stupid) and publicly disregards the Board's November 14 decision. Aside from any disrespect such misconduct may engender among employees for the law and our government's institutions, TSF's unlawful conduct has been a financial cost to the taxpayers and to the Union.

Although the General Counsel does not request reimbursement for its expenses of the hearing in this case, the Union does seek reimbursement for its expenses associated with the hearing and also its organizational costs in connection with the third election. The Union does not request reimbursement for the organizational expenses it will sustain respecting the fourth election. The record justifies imposition of the Union's requested remedy, and I shall include that provision in the order.

Because TSF has shown a proclivity to engage in the conduct I have found unlawful, I shall issue a broad cease and desist order.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Texas Super Foods, Inc., LaMarque and Texas City, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that if UFCWU Local 455 wins the election the employees will lose their jobs.

(b) Threatening employees that if UFCWU Local 455 wins the election a strike would be inevitable and strikers will lose their jobs.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Require its president and owner, Jerry Savage, to read to TSF's unit employees, assembled (in small groups) for that purpose only, the notice to employees, attached to this decision, which Jerry Savage has signed as Respondent's representative.

(b) Afford the Board, through the Regional Director, and Local 455 reasonable notice and opportunity to have two representatives each present when President Savage reads the notice to employees.

(c) Immediately on request of Local 455, and during the time frame between the Board's adoption of this order and the hours of the fourth election, grant the Union and its representatives reasonable access to TSF's bulletin boards and to all places where notices to employees are customarily posted.

(d) Immediately on request of Local 455, and during the time frame specified in (c), grant to two Local 455 representatives per store access to nonwork areas so that the Union may present, orally and in writing, its view on unionization to the employees in such nonwork areas during nonwork time of such employees.

(e) In the event TSF, before the fourth election, addresses assembled groups of employees on the subject of the fourth election and union representation, grant the Union reasonable notice and the opportunity to have two representatives present at such speech and, on request, give one or both of the representatives, as designated by the Union, equal time and facilities to respond.

(f) Without regard to whether TSF addresses its employees for the fourth election, and in addition to any equal-time response described in 2(e), grant the Union, on request, reasonable access to its two stores (one or two representatives per store, at the Union's option) to deliver a 30-minute speech, on issues pertaining to the fourth election, to small groups of employees (during their normal working time and at TSF's expense) in a time frame of not more than 10 working days before, but not less than 48 consecutive hours before, the fourth election.

(g) Pay to the Union the reasonable cost and expenses, including attorney's fees, incurred by the Union in investigating, preparing, and litigating this case, including as to any appeals from the decision of the administrative law judge, and the same incurred in connection with the third election conducted on December 16, 1988.

(h) Post at its LaMarque and Texas City grocery stores, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 16 after being signed by Respondent's president and owner, Jerry Savage, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the third election, held December 16, 1988, in Case 23–RM–436, is set aside and the case is remanded to the Regional Director for Region 16 for the purpose of conducting a fourth election whenever the Regional Director deems appropriate.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you that if UFCWU Local 455 wins the election you will lose your jobs.

WE WILL NOT threaten you that if UFCWU Local 455 wins the election a strike would be inevitable and that strikers will lose their jobs.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL require our president and owner, Jerry Savage, to assemble you and read this notice to you, and WE WILL afford the National Labor Relations Board, through its Regional Director for Region 16, and WE WILL also afford Local 455, reasonable notice to have two representatives each present when President Jerry Savage reads this notice to bargaining unit employees.

WE WILL, immediately on request of Local 455, and during the time frame between the Board's order and the hours of the fourth election directed by the National Labor Relations Board, grant the Union and its representatives reasonable access to our bulletin boards, and to all places where notices to employees are customarily posted, to post notices bearing on the fourth election.

WE WILL, immediately on request of Local 455, and in the time frame before the fourth election, grant to two representatives of the Union per store access to nonwork areas so that the Union may present, orally and in writing, its view on unionization to the employees in such nonwork areas during nonwork time of such employees.

WE WILL, in the event we address you in assembled groups on the subject of the fourth election and union representation before the fourth election, grant the Union reasonable notice and the opportunity to have two representa-

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

tives present at such speech and, on request, and WE WILL give one or both of the representatives, as designated by the Union, equal time and facilities to respond.

WE WILL, without regard to whether we address you respecting the fourth election, grant the Union, on request, reasonable access to our two stores (one or two representatives per store, at the Union's option) to deliver a 30-minute speech, on issues pertaining to the fourth election, to small groups of employees (during your normal working time and at our expense) in a time frame of not more than 10 working days before, but not less than 48 consecutive hours before, the fourth election.

WE WILL pay to the Union its reasonable costs and expenses, including attorney's fees, incurred by the Union in investigating, preparing, and litigating this case, and respecting any appeals from the decision of the Administrative Law Judge, and the same incurred in connection with the third election conducted on December 16, 1988.

TEXAS SUPER FOODS, INC.